

SENATE FLOOR SUBSTITUTE FOR
SENATE BILL 206

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

AN ACT

RELATING TO THE ENVIRONMENT; AMENDING SECTIONS OF THE WATER
QUALITY ACT TO LIMIT RULEMAKING TO SPECIFIC AUTHORITY OF THE
ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 74-6-4 NMSA 1978 (being Laws 1967,
Chapter 190, Section 4, as amended) is amended to read:

"74-6-4. DUTIES AND POWERS OF COMMISSION.--The
commission:

A. may accept and supervise the administration of
loans and grants from the federal government and from other
sources, public or private, which loans and grants shall not be
expended for other than the purposes for which provided;

B. shall adopt a comprehensive water quality
management program and develop a continuing planning process;

.178575.1

underscored material = new
[bracketed material] = delete

1 C. shall not adopt or promulgate a standard or
2 regulation that exceeds a specific grant of rulemaking
3 authority listed in the specific statutory section of the Water
4 Quality Act authorizing the standard or regulation;

5 ~~[C.]~~ D. shall adopt water quality standards for
6 surface and ground waters of the state based on credible
7 scientific data and other evidence appropriate under the Water
8 Quality Act. The standards shall include narrative standards
9 and as appropriate, the designated uses of the waters and the
10 water quality criteria necessary to protect such uses. The
11 standards shall at a minimum protect the public health or
12 welfare, enhance the quality of water and serve the purposes of
13 the Water Quality Act. In making standards, the commission
14 shall give weight it deems appropriate to all facts and
15 circumstances, including the use and value of the water for
16 water supplies, propagation of fish and wildlife, recreational
17 purposes and agricultural, industrial and other purposes;

18 ~~[D.]~~ E. shall adopt, promulgate and publish
19 regulations to prevent or abate water pollution in the state or
20 in any specific geographic area, aquifer or watershed of the
21 state or in any part thereof, or for any class of waters, and
22 to govern the disposal of septage and sludge and the use of
23 sludge for various beneficial purposes. The regulations
24 governing the disposal of septage and sludge may include the
25 use of tracking and permitting systems or other reasonable

.178575.1

1 means necessary to assure that septage and sludge are
2 designated for disposal in, and arrive at, disposal facilities,
3 other than facilities on the premises where the septage and
4 sludge is generated, for which a permit or other authorization
5 has been issued pursuant to the federal act or the Water
6 Quality Act. Regulations [~~shall not specify the method to be~~
7 ~~used to prevent or abate water pollution but~~] may specify a
8 standard of performance for new sources that reflects the
9 greatest reduction in the concentration of water contaminants
10 that the commission determines to be achievable through
11 application of the best available demonstrated control
12 technology, processes, operating methods or other alternatives,
13 including where practicable a standard permitting no discharge
14 of pollutants. In making regulations, the commission shall
15 give weight it deems appropriate to all relevant facts and
16 circumstances, including:

- 17 (1) character and degree of injury to or
18 interference with health, welfare, environment and property;
19 (2) the public interest, including the social
20 and economic value of the sources of water contaminants;
21 (3) technical practicability and economic
22 reasonableness of reducing or eliminating water contaminants
23 from the sources involved and previous experience with
24 equipment and methods available to control the water
25 contaminants involved;

.178575.1

1 (4) successive uses, including but not limited
2 to domestic, commercial, industrial, pastoral, agricultural,
3 wildlife and recreational uses;

4 (5) feasibility of a user or a subsequent user
5 treating the water before a subsequent use;

6 (6) property rights and accustomed uses; and

7 (7) federal water quality requirements;

8 [~~E.~~] F. shall assign responsibility for
9 administering its regulations to constituent agencies so as to
10 assure adequate coverage and prevent duplication of effort. To
11 this end, the commission may make such classification of waters
12 and sources of water contaminants as will facilitate the
13 assignment of administrative responsibilities to constituent
14 agencies. The commission shall also hear and decide disputes
15 between constituent agencies as to jurisdiction concerning any
16 matters within the purpose of the Water Quality Act. In
17 assigning responsibilities to constituent agencies, the
18 commission shall give priority to the primary interests of the
19 constituent agencies. The department of environment shall
20 provide technical services, including certification of permits
21 pursuant to the federal act, and shall maintain a repository of
22 the scientific data required by this act;

23 [~~F.~~] G. may enter into or authorize constituent
24 agencies to enter into agreements with the federal government
25 or other state governments for purposes consistent with the

.178575.1

1 Water Quality Act and receive and allocate to constituent
2 agencies funds made available to the commission;

3 ~~[G.]~~ H. may grant an individual variance from any
4 regulation of the commission whenever it is found that
5 compliance with the regulation will impose an unreasonable
6 burden upon any lawful business, occupation or activity. The
7 commission may only grant a variance conditioned upon a person
8 effecting a particular abatement of water pollution within a
9 reasonable period of time. Any variance shall be granted for
10 the period of time specified by the commission. The commission
11 shall adopt regulations specifying the procedure under which
12 variances may be sought, which regulations shall provide for
13 the holding of a public hearing before any variance may be
14 granted;

15 ~~[H.]~~ I. may adopt regulations to require the filing
16 with it or a constituent agency of proposed plans and
17 specifications for the construction and operation of new sewer
18 systems, treatment works or sewerage systems or extensions,
19 modifications of or additions to new or existing sewer systems,
20 treatment works or sewerage systems. Filing with and approval
21 by the federal housing administration of plans for an extension
22 to an existing or construction of a new sewerage system
23 intended to serve a subdivision solely residential in nature
24 shall be deemed compliance with all provisions of this
25 subsection;

.178575.1

1 ~~[F.]~~ J. may adopt regulations requiring notice to
2 it or a constituent agency of intent to introduce or allow the
3 introduction of water contaminants into waters of the state;

4 K. shall specify in regulations the measures to be
5 taken to prevent water pollution and to monitor water quality
6 at dairies and hard rock mining facilities, excluding uranium
7 mining and processing facilities. The commission shall
8 consider, in addition to the factors listed in Subsection E of
9 this section, the best available scientific information. The
10 regulations may include variations in requirements based on
11 site-specific factors, such as depth and distance to ground
12 water and geological and hydrological conditions. The
13 constituent agency shall establish an advisory committee
14 composed of persons with knowledge and expertise particular to
15 the industry category and other interested stakeholders to
16 advise the constituent agency on appropriate regulations to be
17 proposed for adoption by the commission. The regulations shall
18 be developed and adopted in accordance with a schedule approved
19 by the commission. The schedule shall incorporate an
20 opportunity for public input and stakeholder negotiations;

21 ~~[J.]~~ L. may adopt regulations establishing
22 pretreatment standards that prohibit or control the
23 introduction into publicly owned sewerage systems of water
24 contaminants that are not susceptible to treatment by the
25 treatment works or that would interfere with the operation of

.178575.1

1 the treatment works;

2 [K-] M. shall not require a permit respecting the
3 use of water in irrigated agriculture, except in the case of
4 the employment of a specific practice in connection with such
5 irrigation that documentation or actual case history has shown
6 to be hazardous to public health or the environment;

7 [L-] N. shall not require a permit for applying
8 less than two hundred fifty gallons per day of private
9 residential gray water originating from a residence for the
10 resident's household gardening, composting or landscape
11 irrigation if:

12 (1) a constructed gray water distribution
13 system provides for overflow into the sewer system or on-site
14 wastewater treatment and disposal system;

15 (2) a gray water storage tank is covered to
16 restrict access and to eliminate habitat for mosquitos or other
17 vectors;

18 (3) a gray water system is sited outside of a
19 floodway;

20 (4) gray water is vertically separated at
21 least five feet above the ground water table;

22 (5) gray water pressure piping is clearly
23 identified as a nonpotable water conduit;

24 (6) gray water is used on the site where it is
25 generated and does not run off the property lines;

.178575.1

1 (7) gray water is applied in a manner that
2 minimizes the potential for contact with people or domestic
3 pets;

4 (8) ponding is prohibited, application of gray
5 water is managed to minimize standing water on the surface and
6 to ensure that the hydraulic capacity of the soil is not
7 exceeded;

8 (9) gray water is not sprayed;

9 (10) gray water is not discharged to a
10 watercourse; and

11 (11) gray water use within municipalities or
12 counties complies with all applicable municipal or county
13 ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978;
14 and

15 ~~[M.]~~ O. shall coordinate application procedures and
16 funding cycles for loans and grants from the federal
17 government and from other sources, public or private, with
18 the local government division of the department of finance
19 and administration pursuant to the New Mexico Community
20 Assistance Act."

21 Section 2. Section 74-6-5 NMSA 1978 (being Laws 1973,
22 Chapter 326, Section 4, as amended) is amended to read:

23 "74-6-5. PERMITS--CERTIFICATION--APPEALS TO COMMISSION.--

24 A. By regulation, the commission may require
25 persons to obtain from a constituent agency designated by the

.178575.1

1 commission a permit for the discharge of any water contaminant
2 or for the disposal or reuse of septage or sludge.

3 B. The commission shall adopt regulations
4 establishing procedures for certifying federal water quality
5 permits.

6 C. Prior to the issuance of a permit, the
7 constituent agency may require the submission of plans,
8 specifications and other relevant information that it deems
9 necessary.

10 D. The commission shall by regulation set the dates
11 upon which applications for permits shall be filed and
12 designate the time periods within which the constituent agency
13 shall, after the filing of an administratively complete
14 application for a permit, either grant the permit, grant the
15 permit subject to conditions or deny the permit. A permit
16 subject to conditions shall not contain a condition that is not
17 specifically authorized by statute or rule. The constituent
18 agency has the burden of showing that each condition is
19 reasonable and necessary to ensure compliance with the Water
20 Quality Act and applicable regulations, considering
21 site-specific conditions. No condition shall be imposed in a
22 final permit without an opportunity for the applicant to review
23 and provide comments in writing on the draft permit conditions
24 and to receive an explanation of the reasons for the conditions
25 from the constituent agency.

.178575.1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E. The constituent agency shall deny any application for a permit or deny the certification of a federal water quality permit if:

(1) the effluent would not meet applicable state or federal effluent regulations, standards of performance or limitations;

(2) any provision of the Water Quality Act would be violated;

(3) the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard. Determination of the ~~[discharges¹]~~ discharge's effect on ground water shall be measured at any place of withdrawal of water for present or reasonably foreseeable future use. Determination of the ~~[discharges¹]~~ discharge's effect on surface waters shall be measured at the point of discharge; or

(4) the applicant has, within the ten years immediately preceding the date of submission of the permit application:

(a) knowingly misrepresented a material fact in an application for a permit;

(b) refused or failed to disclose any information required under the Water Quality Act;

(c) been convicted of a felony or other

underscored material = new
[bracketed material] = delete

1 crime involving moral turpitude;

2 (d) been convicted of a felony in any
3 court for any crime defined by state or federal law as being a
4 restraint of trade, price-fixing, bribery or fraud;

5 (e) exhibited a history of willful
6 disregard for environmental laws of any state or the United
7 States; or

8 (f) had an environmental permit revoked
9 or permanently suspended for cause under any environmental laws
10 of any state or the United States.

11 F. The commission shall by regulation develop
12 procedures that ensure that the public, affected governmental
13 agencies and any other state whose water may be affected shall
14 receive notice of each application for issuance, renewal or
15 modification of a permit. Public notice shall include:

16 (1) for issuance or modification of a permit:

17 (a) notice by mail to adjacent and
18 nearby landowners; local, state and federal governments; land
19 grant organizations; ditch associations; and Indian nations,
20 tribes or pueblos;

21 (b) posting at a place conspicuous to
22 the public and near the discharge or proposed discharge site;
23 and

24 (c) a display advertisement in English
25 and Spanish in a newspaper of general circulation in the

.178575.1

1 location of the discharge or proposed discharge; provided,
2 however, that the advertisement shall not be displayed in the
3 classified or legal advertisement sections; and

4 (2) for issuance of renewals of permits:

5 (a) notice by mail to the interested
6 public, municipalities, counties, land grant organizations,
7 ditch associations and Indian nations, tribes or pueblos; and

8 (b) a display advertisement in English
9 and Spanish in a newspaper of general circulation in the
10 location of the discharge; provided, however, that the
11 advertisement shall not be displayed in the classified or legal
12 advertisement sections.

13 G. No ruling shall be made on any application for a
14 permit without opportunity for a public hearing at which all
15 interested persons shall be given a reasonable chance to submit
16 evidence, data, views or arguments orally or in writing and to
17 examine witnesses testifying at the hearing. The hearing shall
18 be recorded. Any person submitting evidence, data, views or
19 arguments shall be subject to examination at the hearing.

20 H. The commission may adopt regulations for the
21 operation and maintenance of the permitted facility, including
22 requirements, as may be necessary or desirable, that relate to
23 continuity of operation, personnel training and financial
24 responsibility, including financial responsibility for
25 corrective action.

.178575.1

1 I. Permits shall be issued for fixed terms not to
2 exceed five years, except that for new discharges, the term of
3 the permit shall commence on the date the discharge begins, but
4 in no event shall the term of the permit exceed seven years
5 from the date the permit was issued.

6 J. By regulation, the commission may impose
7 reasonable conditions upon permits requiring permittees to:

8 (1) install, use and maintain effluent
9 monitoring devices;

10 (2) sample effluents and receiving waters for
11 any known or suspected water contaminants in accordance with
12 methods and at locations and intervals as may be prescribed by
13 the commission;

14 (3) establish and maintain records of the
15 nature and amounts of effluents and the performance of effluent
16 control devices;

17 (4) provide any other information relating to
18 the discharge or direct or indirect release of water
19 contaminants; and

20 (5) notify a constituent agency of the
21 introduction of new water contaminants from a new source and of
22 a substantial change in volume or character of water
23 contaminants being introduced from sources in existence at the
24 time of the issuance of the permit.

25 K. The commission shall provide by regulation a

.178575.1

1 schedule of fees for permits, not exceeding the estimated cost
2 of investigation and issuance, modification and renewal of
3 permits. Fees collected pursuant to this section shall be
4 deposited in the water quality management fund.

5 L. The issuance of a permit does not relieve any
6 person from the responsibility of complying with the provisions
7 of the Water Quality Act, any applicable regulations or water
8 quality standards of the commission or any applicable federal
9 laws, regulations or standards.

10 M. A permit may be terminated or modified by the
11 constituent agency that issued the permit prior to its date of
12 expiration for any of the following causes:

13 (1) violation of any condition of the permit;

14 (2) obtaining the permit by misrepresentation
15 or failure to disclose fully all relevant facts;

16 (3) violation of any provisions of the Water
17 Quality Act or any applicable regulations, standard of
18 performance or water quality standards;

19 (4) violation of any applicable state or
20 federal effluent regulations or limitations; or

21 (5) change in any condition that requires
22 either a temporary or permanent reduction or elimination of the
23 permitted discharge.

24 N. If the constituent agency denies, terminates or
25 modifies a permit or grants a permit subject to condition, the

1 constituent agency shall notify the applicant or permittee by
2 certified mail of the action taken and the reasons. Notice
3 shall also be given by mail to persons who participated in the
4 permitting action.

5 O. A person who participated in a permitting action
6 before a constituent agency or a person affected by a
7 certification of a federal permit and who is adversely affected
8 by such permitting action or certification may file a petition
9 for review before the commission. Unless a timely petition for
10 review is made, the decision of the constituent agency shall be
11 final and not subject to judicial review. The petition shall:

12 (1) be made in writing to the commission
13 within thirty days from the date notice is given of the
14 constituent agency's action;

15 (2) include a statement of the issues to be
16 raised and the relief sought; and

17 (3) be provided to all other persons
18 submitting evidence, data, views or arguments in the proceeding
19 before the constituent agency.

20 P. If a timely petition for review is made, the
21 commission shall consider the petition within ninety days after
22 receipt of the petition. The commission shall notify the
23 petitioner and the applicant or permittee, if other than the
24 petitioner, by certified mail of the date, time and place of
25 the review. If the petitioner is not the applicant or

.178575.1

1 permittee, the applicant or permittee shall be a party to the
2 proceeding. The commission shall ensure that the public
3 receives notice of the date, time and place of the review.

4 Q. The commission shall review the record compiled
5 before the constituent agency, including the transcript of any
6 public hearing held on the application or draft permit, and
7 shall allow any party to submit arguments. The commission may
8 designate a hearing officer to review the record and the
9 arguments of the parties and recommend a decision to the
10 commission. The commission shall consider and weigh only the
11 evidence contained in the record before the constituent agency
12 and the recommended decision of the hearing officer, if any,
13 and shall not be bound by the factual findings or legal
14 conclusions of the constituent agency. Based on the review of
15 the evidence, the arguments of the parties and recommendations
16 of the hearing officer, the commission shall sustain, modify or
17 reverse the action of the constituent agency. The commission
18 shall enter ultimate findings of fact and conclusions of law
19 and keep a record of the review.

20 R. Prior to the date set for review, if a party
21 shows to the satisfaction of the commission that there was no
22 reasonable opportunity to submit comment or evidence on an
23 issue being challenged, the commission shall order that
24 additional comment or evidence be taken by the constituent
25 agency. Based on the additional evidence, the constituent

.178575.1

1 agency may revise the decision and shall promptly file with the
2 commission the additional evidence received and action taken.
3 The commission shall consider the additional evidence within
4 ninety days after receipt of the additional evidence and shall
5 notify the petitioner and the applicant or permittee, if other
6 than the petitioner, of the date, time and place of the review.

7 S. The commission shall notify the petitioner and
8 all other participants in the review proceeding of the action
9 taken by the commission and the reasons for that action."